

**TEXAS DEPARTMENT OF MOTOR VEHICLES  
CASE NO. 15-0170 CAF**

**NANCY T. YOUNGER-CUSSON and  
ALBERT M. CUSSON,  
Complainants**

v.

**VOLVO GROUP NORTH AMERICA,  
LLC,  
Respondent**

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**BEFORE THE OFFICE**

**OF**

**ADMINISTRATIVE HEARINGS**

**DECISION AND ORDER**

Nancy T. Younger-Cusson and Albert M. Cusson (Complainants) filed a complaint with the Texas Department of Motor Vehicles seeking relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged warrantable defects in their vehicle manufactured by Volvo Group North America, LLC (Respondent). The hearings examiner concludes that the subject vehicle has a warrantable defect that substantially impairs the vehicle's use or market value. Consequently, the Complainants' vehicle qualifies for repurchase/replacement relief.

**I. Procedural History, Notice and Jurisdiction**

Matters of notice of hearing<sup>1</sup> and jurisdiction were not contested and are discussed only in the Findings of Fact and Conclusions of Law. The hearing in this case convened on the following days before Hearings Examiner Andrew Kang: September 24, 2015, in Houston, Texas; and December 1, 2015, and January 28, 2016, in Austin, Texas. The record closed at the conclusion of the hearing on January 28, 2016. The Complainants, represented and testified for themselves. In addition, Ken Cameron testified for the Complainants. Christopher (Chris) Lavorato, attorney, represented the Respondent. Edward (Ed) Meyers, Technical Service Manager, and Andrew Walecka, North American Feature Lead for Ride and Handling, testified for the Respondent.

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<sup>1</sup> TEX. GOV'T CODE § 2001.051.

## II. Discussion

### A. Applicable Law

#### 1. Repurchase/Replacement Relief

A vehicle qualifies for repurchase or replacement if the manufacturer cannot “conform a motor vehicle to an applicable express warranty by repairing or correcting a defect or condition that creates a serious safety hazard or substantially impairs the use or market value of the motor vehicle after a reasonable number of attempts.”<sup>2</sup> In other words, (1) the vehicle must have a defect covered by an applicable warranty (warrantable defect); (2) the defect must either (a) create a serious safety hazard or (b) substantially impair the use or market value of the vehicle; and (3) the defect must continue to exist after a “reasonable number of attempts” at repair.<sup>3</sup> In addition, the Lemon Law imposes other requirements for repurchase/replacement relief, including (1) a mailed written notice of the defect to the manufacturer, (2) an opportunity to repair by the manufacturer, and (3) a deadline for filing a Lemon Law complaint.

##### a. Serious Safety Hazard

The Lemon Law defines “serious safety hazard” as a life threatening malfunction or nonconformity that: (1) substantially impedes a person’s ability to control or operate a vehicle for ordinary use or intended purposes, or (2) creates a substantial risk of fire or explosion.<sup>4</sup>

##### b. Substantial Impairment of Value

The Department applies a reasonable purchaser standard for determining whether a defect substantially impairs the value of a vehicle. Under this standard, “factfinders should put themselves in the position of a reasonable prospective purchaser of the subject vehicle and determine (based on the evidence presented) if the current condition of the vehicle would deter them from buying the vehicle or substantially negatively affect how much they would be willing to pay for the vehicle.”<sup>5</sup>

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<sup>2</sup> TEX. OCC. CODE § 2301.604(a).

<sup>3</sup> TEX. OCC. CODE § 2301.604(a).

<sup>4</sup> TEX. OCC. CODE § 2301.601(4).

<sup>5</sup> *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 228 (Tex. App.—Austin 2012).

**c. Reasonable Number of Repair Attempts**

The Lemon Law provides three ways to establish a rebuttable presumption that a reasonable number of repair attempts have been undertaken.<sup>6</sup> The first applies generally,<sup>7</sup> the second applies to serious safety hazards,<sup>8</sup> and the third applies to vehicles out of service for repair for at least 30 days.<sup>9</sup>

Generally, a rebuttable presumption is established that the vehicle had a reasonable number of repair attempts if:

[T]he same nonconformity continues to exist after being subject to repair four or more times by the manufacturer, converter, or distributor or an authorized agent or franchised dealer of a manufacturer, converter, or distributor and: (A) two of the repair attempts were made in the 12 months or 12,000 miles, whichever occurs first, following the date of original delivery to the owner; and (B) the other two repair attempts were made in the 12 months or 12,000 miles, whichever occurs first, immediately following the date of the second repair attempt.<sup>10</sup>

Alternatively, for serious safety hazards, a rebuttable presumption is established that the vehicle had a reasonable number of repair attempts if:

[T]he same nonconformity creates a serious safety hazard and continues to exist after causing the vehicle to have been subject to repair two or more times by the manufacturer, converter, or distributor or an authorized agent or franchised dealer of a manufacturer, converter, or distributor and: (A) at least one attempt to repair the nonconformity was made in the 12 months or 12,000 miles, whichever occurs first, following the date of original delivery to the owner; and (B) at least one other attempt to repair the nonconformity was made in the 12 months or 12,000 miles, whichever occurs first, immediately following the date of the first repair attempt.<sup>11</sup>

Additionally, for vehicles out of service at least 30 days, a rebuttable presumption may be established that the vehicle had a reasonable number of repair attempts if:

[A] nonconformity still exists that substantially impairs the vehicle's use or market value and: (A) the vehicle is out of service for repair for a cumulative total

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<sup>6</sup> TEX. OCC. CODE § 2301.605(a).

<sup>7</sup> TEX. OCC. CODE § 2301.605(a)(1).

<sup>8</sup> TEX. OCC. CODE § 2301.605(a)(2).

<sup>9</sup> TEX. OCC. CODE § 2301.605(a)(3).

<sup>10</sup> TEX. OCC. CODE § 2301.605(a)(1)(A) and (B).

<sup>11</sup> TEX. OCC. CODE § 2301.605(a)(2).

of 30 or more days in the 24 months or 24,000 miles, whichever occurs first, following the date of original delivery to the owner; and (B) at least two repair attempts were made in the 12 months or 12,000 miles following the date of original delivery to an owner.<sup>12</sup>

However, the statutory rebuttable presumption does not preclude otherwise finding a reasonable number of attempts to repair the vehicle based on different circumstances and fewer attempts.<sup>13</sup> Furthermore, the Department adopted a decision implying that if the consumer takes the vehicle for a service visit then that visit would constitute a repair attempt unless the consumer was at fault for failure to repair the vehicle.<sup>14</sup>

**d. Other Requirements**

Even if a vehicle satisfies the preceding requirements for repurchase/replacement relief, the Lemon Law prohibits repurchase or replacement unless: (1) the owner mailed written notice of the alleged defect or nonconformity to the manufacturer;<sup>15</sup> (2) the manufacturer was given an opportunity to cure the defect or nonconformity;<sup>16</sup> and (3) the owner or someone on behalf of the owner filed the Lemon Law complaint within six months after the earliest of: the warranty's expiration date or the dates on which 24 months or 24,000 miles have passed since the date of original delivery of the motor vehicle to an owner.<sup>17</sup>

**2. Warranty Repair Relief**

Even if repurchase or replacement relief does not apply, a vehicle may still qualify for warranty repair under Section 2301.204 of the Texas Occupations Code if the vehicle has a

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<sup>12</sup> TEX. OCC. CODE § 2301.605(a)(3).

<sup>13</sup> “[T]he existence of statutory presumptions does not forbid the agency from finding that different circumstances or fewer attempts meet the requisite ‘reasonable number of attempts.’” *Ford Motor Company v. Texas Department of Transportation*, 936 S.W.2d 427, 432 (Tex. App.—Austin 1996, no writ).

<sup>14</sup> “[O]nly those occasions when failure to repair the vehicle was the fault of the consumer would not be considered a repair attempt under the statute.” *DaimlerChrysler Corporation v. Williams*, No. 03-99-00822-CV (Tex. App.—Austin, June 22, 2000, no writ) (not designated for publication).

<sup>15</sup> TEX. OCC. CODE § 2301.606(c)(1).

<sup>16</sup> TEX. OCC. CODE § 2301.606(c)(2). Note: a repair visit to a dealer satisfies the “opportunity to cure” requirement if the manufacturer authorized repairs by the dealer after written notice to the manufacturer. See *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 226 (Tex. App.—Austin 2012).

<sup>17</sup> TEX. OCC. CODE § 2301.606(d)(2).

“defect . . . that is covered by a manufacturer’s . . . warranty agreement applicable to the vehicle.”<sup>18</sup>

#### A. Summary of Complainants’ Evidence and Arguments

On April 11, 2014, the Complainants took delivery of a new 2014 Volvo VNL 780 from Sweeten Truck Center, L.C., a franchised dealer of the Respondent, Volvo Group North America, LLC, in Houston, Texas.<sup>19</sup> The vehicle had 1,201 miles at delivery. The applicable warranty’s basic coverage lasts for 12 months or 100,000 miles or 3,250 operating hours.<sup>20</sup>

Mrs. Cusson testified that the primary issue was cab stability. She explained that the problems with the cab caused control issues for the driver as well as interfering with required berth times. Because of the cab instability, the Complainants would sleep on the floor. Mrs. Cusson noted that the back of the cab sometimes “bottoms out” and causes injury. Mrs. Cusson first noticed the issue when taking the truck from Houston to Dallas the day of or the day after taking delivery of the truck from the dealer. Additionally, Mrs. Cusson identified a concern with the workstation. The workstation’s plastic top was warped but was replaced with another warped top. Mrs. Cusson explained that the TriPac auxiliary power unit (APU), located under the workstation, emitted carbon monoxide and the bowed section with improper sealing allowed air to come in. Mrs. Cusson clarified that the bowed section closed off the under bunk storage, which contains the APU, from the cab. Mr. Cusson testified that the cab moves left and right (rolls) constantly, noticeable depending on the type of road and wind conditions. Mrs. Cusson explained that cross winds, bridge abutments, construction zones, roads in disrepair, were difficult to deal with. Mrs. Cusson testified that they would get pulled in at the scales because of the vehicle squeaking. Mr. Cameron testified that he experienced the vehicle “pushing” (resisting changing directions). Mr. Cameron further stated that having to react to the rolling could be fatiguing. Mr. Cameron later explained that he first drove the vehicle with a trailer and then without but the vehicle basically handled the same. Mr. Cusson testified that he had driven another Volvo 780 but that vehicle did not exhibit any roll at all. Mrs. Cusson explained that the cab should move up and down but not side to side. If the cab leans to one side, it should re-center

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<sup>18</sup> TEX. OCC. CODE § 2301.204.

<sup>19</sup> Complainants’ Ex. 3, Buyer’s Order; Complainants’ Ex. 4, Lemon Law Complaint.

<sup>20</sup> Complainants’ Ex. 1, Warranty Certificate.

itself immediately. However, the Complainants' vehicle wavers from side to side. Mr. Cusson testified that the APU weighs 325 pounds and the inverter about 40 pounds. Mrs. Cusson's testimony shows that she and Mr. Cusson together weigh 450 pounds. Mrs. Cusson noted that the vehicle has a gross vehicle weight rating of 53,000 pounds. Mr. Cusson observed the same model vehicle in the same lane and noticed that it did not roll as much as the subject vehicle. Likewise, Mrs. Cusson had an opportunity to observe a Volvo 780 with a flatbed trailer and she could not see any noticeable sway. Mr. Cusson testified that they replaced the cab shocks on their previous vehicle just once. In comparison, the subject vehicle needed cab shock replacement at least four times over the course of a little over a year and a half. Mrs. Cusson explained that the vehicle's sway did not differ when bobtailing or pulling a trailer. In closing, Mrs. Cusson reiterated that they first complained on the second day of ownership, when the vehicle was new without any additions or alterations. Moreover, the vehicle did not have a load for the test drive at the hearing, making the slide irrelevant. The Complainants expressed a preference to have their vehicle fixed or replaced.

In relevant part, the Complainants took the vehicle to a dealer for repair as shown below:

Date	Miles	Issue
04/30/2014	1,445	Ride quality <sup>21</sup>
07/23/2014	15,914	Cab, ride quality <sup>22</sup>
08/20/2014	22,634	Ride quality
08/26/2014	24,414	Ride, air bags
08/28/2014	24,780	Ride, cab <sup>23</sup>
09/26/2014	27,773	Ride <sup>24</sup>
10/20/2014	34,583	Ride <sup>25</sup>
02/02/2015	45,851	Ride, cab <sup>26</sup>
02/23/2015	51,599	Ride, cab <sup>27</sup>
05/04/2015	71,160	Ride, cab shocks, leaning <sup>28</sup>
05/28/2015	75,500	Air bags <sup>29</sup>
06/01/2015	76,091	Ride, leaning, cab <sup>30</sup>
07/28/2015	86,696	Ride <sup>31</sup>
11/17/2015	115,911	Cab shock <sup>32</sup>

The Complainants did not have an invoice for every repair attempt but testified as to the facts of the repair attempts for which they had no invoices. In part, the dealers found problems with the air bags leaning, the cab shifted to one side, The Complainants stated that their vehicle continued to exhibit problems despite the repair attempts.

On February 13, 2015, the Complainants mailed a written notice of defect to the Respondent. On February 25, 2015, the Complainants filed a Lemon Law complaint (Complaint) with the Texas Department of Motor Vehicles (Department) alleging that the cab was out of alignment, causing air bags to lean to one side and fail, causing shock absorbers to fail, causing swaying from side to side and up and down, making the driver unstable and unable to control the

<sup>21</sup> Complainants' Ex. 7, RO 13925SS.

<sup>22</sup> Complainants' Ex. 8, Invoice 110330.

<sup>23</sup> Complainants' Ex. 10, Invoice 14000727.

<sup>24</sup> Complainants' Ex. 11, Invoice CW20115.

<sup>25</sup> Complainants' Ex. 12, Invoice 111733.

<sup>26</sup> Complainants' Ex. 14, Invoice 14003020.

<sup>27</sup> Complainants' Ex. 15, Invoice RW472763C.

<sup>28</sup> Complainants' Ex. 16, Invoice CW23134.

<sup>29</sup> Complainants' Ex. 18, Invoice 315091909.

<sup>30</sup> Complainants' Ex. 19, Invoice 953843.

<sup>31</sup> Complainants' Ex. 21, Invoice CW24297.

<sup>32</sup> Complainants' Ex. 23, Invoice CW26011.

vehicle, and the cab work station bench was bowed, which made heating and cooling difficult in extreme conditions and possibly allowed entry of carbon monoxide from the TriPac auxiliary power unit (APU) into the cab.

### **B. Summary of Respondent's Evidence and Arguments**

Mr. Meyers testified that the vehicle's manual cautions against overloading the cab and warns that loads should be equally distributed. He further stated that the maximum cab content is 1,000 pounds including the driver and passenger (however, the vehicle manual provided to the Complainants did not include the 1,000 pound maximum).

When the hearings examiner asked Mr. Meyers if the height of the vehicle would affect handling, he explained that if steering from one side to the other, the vehicle will act as a lever and that it will move and has to move according to its design. The hearing examiner also asked Mr. Meyers about the frequency of replacing cab shocks and he answered that the replacement depended on the vehicle's use.

On cross-examination, Mr. Cusson stated that the vehicle had a 24-inch slide at delivery. Mrs. Cusson confirmed that they had a fifth wheel slide addition installed. Mr. and Mrs. Cusson explained that when ordering their vehicle, they had the option of placing the 24-inch slide anywhere on the frame. Mr. Cusson responded that using three different positions on the slide, the vehicle had the same ride. Mr. Cusson explained that they could not use the slide as actually placed on the vehicle. Mr. Cusson further explained that they had ordered the 24-inch slide to be positioned to allow a single axle (pup trailer) pull. However, the slide was so far forward, ahead of the front axle, that they could not even hook their trailer to the vehicle. The Complainants had ordered the slide placed ahead of the rear axle and slightly in front of the front axle. Because the slide was mounted in the wrong location, the Complainants had the slide addition installed. The Complainants explained that they did not just have the slide repositioned because sometimes they haul oversized loads that require additional header. Mr. Cusson explained that the fifth wheel is located in its present position because the front of the vehicle is too heavy (i.e., moving the fifth wheel forward would cause the vehicle to violate regulatory maximums).

Mr. Walecka testified that the placement of the trailer on the slide would affect handling. He explained that the point between the drive axles is the starting point for fifth wheel placement

for weight distribution purposes. The positioning of the slide changes the load on the axles, so that moving forward increases the load on the steer axle and moving back decreases the load on the steer axle. With the fifth wheel moved back, the vehicle may feel lighter, may bounce, and may be harder to turn. Mr. Walecka confirmed that the slide can be placed anywhere (and that an aftermarket slide can provide even greater flexibility) and explained that the fifth wheel position on the slide depends on trailer configuration, with weight as the primary consideration and overhang as a secondary consideration. Mr. Walecka explained that the wheelbase will limit what options are available and the 24 inch slide is the longest available for the subject vehicle.

Mr. Meyers noted that he observed Mr. Cusson oversteering. Moreover, in an air suspension vehicle, over steer sets up sway. Mr. Meyers affirmed that he agreed with the report by the Department's inspector, which concluded that swaying could not be duplicated and the cab was level on both sides.<sup>33</sup> Mr. Meyers testified that he could not recreate any of the complaints and further stated that the vehicle had no serious defects. Additionally, Mr. Meyers confirmed that he never found the front end to be unstable.

### C. Inspection

The vehicle had 99,750 on the odometer at the inspection at the hearing. Mr. Meyers pointed out that the cab had not actually bottomed out, noting that the no paint transfer occurred between the cab and a cross-member beneath the cab. Mr. Meyers also explained that a problem with the cab's suspension (i.e., a leaning cab) would manifest itself in irregular tire wear. However, the vehicle's tires appeared to be wearing evenly. Mr. Meyers observed that the fifth wheel slide was six to eight inches behind where it should be, which would result in lifting the cab. However, Mr. Meyers stated that the vehicle did not exhibit any instability in the front when test driven. The Complainants called attention to the right cab shock, which appeared compressed by about a quarter inch as compared to a new cab shock. An inspection of the interior showed that the cab contained bedding, clothing, personal items, some books, and food (approximately two dozen cans and several gallon water bottles). The canned food and water appeared to be the only items of significant weight, approximately 40 to 50 pounds. The hearings examiner rode along two test drives using the same route but different drivers: Mrs. Cusson for the first test drive and Mr. Meyers for the second. The hearings examiner asked Mrs. Cusson if

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<sup>33</sup> Respondent's Ex. 6, Vehicle Inspection Report.

the ride on the test drive was normal. She answered that there was some sway and the seat bottomed out. In contrast, Mr. Meyers stated that he did not experience anything abnormal during the test drive.

#### D. Analysis

The record indicates that the subject vehicle continues to have a defect that substantially impairs the use or market value of the vehicle after a reasonable number of repair attempts. Accordingly, the vehicle qualifies for repurchase/replacement relief.

##### 1. Warrantable Defect

The Respondent essentially asserted that the cab roll resulted from vehicle modification (the slide addition) or operator error (oversteering, overloading the cab, or improperly distributing weight). At the same time, Mr. Meyers testified that he never experienced any abnormal performance with the vehicle. However, the evidence indicates that a manufacturing defect, not any modification or operator error, caused the cab roll.

The Complainants clearly testified that the cab roll occurred before any modification to the vehicle and the cab roll occurred when bobtailing after installation of the slide addition. Consequently, the slide addition did not cause the cab roll. Furthermore, the Complainants' video exhibits show multiple instances of the cab rolling.<sup>34</sup> The question remains as to whether such rolling represents a normal characteristic of the vehicle as opposed to a manufacturing defect. In this case, the Respondent did not provide a comparison vehicle or any analysis of a comparison between the subject vehicle and a new like-vehicle. The only comparison came from the Complainants, in their observations of another like vehicle on the same road and their initial test-driving of another like vehicle prior to the purchase of their vehicle. More significantly, the vehicle appears to have required an inordinate number of cab shock replacements.

The owner's manual that came with the subject vehicle did not include the 1,000 pound weight limit that Mr. Meyers cited. In any event, the weight of the items in the cab did not appear to exceed the limit that Mr. Meyers identified.

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<sup>34</sup> Complainants' Ex. 27, Fro[n]tal View Driver 1.AVI; Complainants' Ex. 28, CAB INSIDE.mp4; Complainants' Ex. 29, Afraid To Pass.AVI; Complainants' Ex. 30, Rocking Cab At Stop.AVI; Complainants' Ex. 31, Illinois Danger Narrow Const.AVI; Complainants' Ex. 32, Passing Another Volvo.AVI; Complainants' Ex. 33, SC CONSTRUCTION.MP4.

## 2. Substantial Impairment

Mrs. Cusson testified that, because of the vehicle's cab roll, the Complainants cannot drive the as long because of fatigue and they avoid mountain roads, ice and certain areas, such as Staten Island. Moreover, the Complainants intended to use the vehicle for team operations, but the ride issues interfere with the ability to do so. Accordingly, the defect has substantially impaired the Complainants' use of the vehicle.

## 3. Reasonable Number of Repair Attempts

Although the vehicle did not have two repair attempts in the first 12,000 miles, the vehicle nevertheless had a reasonable number of repair attempts. As previously explained, *Ford Motor Company v. Texas Department of Transportation*, held that the existence of statutory presumptions did not preclude otherwise finding a reasonable number of repair attempts.<sup>35</sup> In the case underlying *Ford*, the first of four repair attempts occurred at 81,753 miles; however, the administrative law judge found the manufacturer "was given a reasonable number of repair attempts for a vehicle of this type, typically used for long-distance hauls of freight; she reasoned the owners of these trucks would be unlikely to meet the presumptions as they attempt to make a living by accumulating a large number of miles over a short time."<sup>36</sup> Precisely the same reasoning applies in this case. Accordingly, the 14 repair attempts over a span of roughly one year and seven months and 114,466 miles constitutes a reasonable number of repair attempts given the nature of the vehicle's use.

## 4. Useful Life

The longest warranty coverage period for the subject vehicle is 1,000,000 miles for internal cab corrosion. With regard to the engine, the major components have coverage for 500,000 miles. Mr. Myer testified that useful life varies from 500,000 to 1,000,000 miles, depending on maintenance. Mrs. Cusson testified that these vehicles typically have 850,000 to 900,000 miles at the time the original owner sells or trades in the vehicle. Accordingly, 850,000 miles appears to be a reasonable useful life to apply in this case.

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<sup>35</sup> *Ford Motor Company v. Texas Department of Transportation*, 936 S.W.2d 427, 432 (Tex. App.—Austin 1996, no writ).

<sup>36</sup> *Ford Motor Company v. Texas Department of Transportation*, 936 S.W.2d 427, 432-433 (Tex. App.—Austin 1996, no writ).

### III. Findings of Fact

1. On April 11, 2014, the Complainants took delivery of a new 2014 Volvo VNL 780 from Sweeten Truck Center, L.C., a franchised dealer of the Respondent, Volvo Group North America, LLC, in Houston, Texas. The vehicle had 1,201 miles at delivery.
2. The applicable warranty's basic coverage lasts for 12 months, 100,000 miles, or 3,250 operating hours.
3. The vehicle's basic coverage had expired by April 11, 2015.
4. The Complainants took the vehicle to a dealer for repair as shown below:

Date	Miles	Issue
04/30/2014	1,445	Ride quality
07/23/2014	15,914	Cab, ride quality
08/20/2014	22,634	Ride quality
08/26/2014	24,414	Ride, air bags
08/28/2014	24,780	Ride, cab
09/26/2014	27,773	Ride
10/20/2014	34,583	Ride
02/02/2015	45,851	Ride, cab
02/23/2015	51,599	Ride, cab
05/04/2015	71,160	Ride, cab shocks, leaning
05/28/2015	75,500	Air bags
06/01/2015	76,091	Ride, leaning, cab
07/28/2015	86,696	Ride
11/17/2015	115,911	Cab shock

5. On February 13, 2015, the Complainants mailed a written notice of defect to the Respondent.
6. On February 25, 2015, the Complainants filed a Lemon Law complaint (Complaint) with the Texas Department of Motor Vehicles (Department) alleging that the cab was out of alignment, causing air bags to lean to one side and fail, causing shock absorbers to fail, causing swaying from side to side and up and down, making the driver unstable and unable to control the vehicle, and the cab work station bench was bowed, which made heating and cooling difficult in extreme conditions and possibly allowed entry of carbon monoxide from the TriPac auxiliary power unit (APU) into the cab.

7. On May 27, 2015, the Department's Office of Administrative Hearings issued a notice of hearing directed to the Complainants and the Respondent, Volvo Group North America, LLC, giving all parties not less than 10 days' notice of hearing and their rights under the applicable rules and statutes. The notice stated the time, place and nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; particular sections of the statutes and rules involved; and the matters asserted.
8. The hearing in this case convened on the following days before Hearings Examiner Andrew Kang: September 24, 2015, in Houston, Texas; and December 1, 2015, and January 28, 2016, in Austin, Texas. The record closed at the conclusion of the hearing on January 28, 2016. The Complainants, represented and testified for themselves. In addition, Ken Cameron testified for the Complainants. Christopher Lavorato, attorney, represented the Respondent. Ed Meyers, Technical Service Manager, and Andrew Walecka, North American Feature Lead for Ride and Handling, testified for the Respondent.
9. The vehicle's odometer displayed 99,750 miles at the time of the hearing.
10. The vehicle's cab exhibited a rolling motion driving over bumps, potholes and other road imperfections during the test drive at the hearing. When driving over some of the road imperfections, the seats would reach the bottom of their suspensions' travel despite being on the firmest setting.
11. The vehicle's cab would roll when driving on apparently smooth roads with no indications of oversteering by the driver.
12. The cab exhibited rolling before any alterations/modifications of the vehicle.
13. The cab exhibited rolling even when the vehicle had no trailer attached.
14. The vehicle's cab rolled more than like vehicles.
15. The vehicle has a useful life of 850,000 miles.

#### IV. Conclusions of Law

1. The Texas Department of Motor Vehicles has jurisdiction over this matter. TEX. OCC. CODE §§ 2301.601-2301.613 (Lemon Law).

2. A hearings examiner of the Department's Office of Administrative Hearings has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation of a decision with findings of fact and conclusions of law, and the issuance of a final order. TEX. OCC. CODE § 2301.704.
3. The Complainants timely filed a sufficient complaint with the Department. TEX. OCC. CODE §§ 2301.204, 2301.606(d); 43 TEX. ADMIN. CODE § 215.202.
4. The parties received proper notice of the hearing. TEX. GOV'T CODE §§ 2001.051, 2001.052; 43 TEX. ADMIN. CODE § 215.206(2).
5. The Complainants bears the burden of proof in this matter. 43 TEX. ADMIN. CODE § 206.66(d).
6. The Complainants' vehicle qualifies for replacement or repurchase. A warrantable defect that substantially impairs the use or market value of the vehicle continues to exist after a reasonable number of repair attempts. TEX. OCC. CODE § 2301.604.

#### V. Order

Based on the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that the Complainants' petition for relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is **GRANTED**. It is further **ORDERED** that the Respondent shall repair the warrantable defect in the reacquired vehicle identified in this Decision. **IT IS THEREFORE ORDERED** that:

1. The Respondent shall, in accordance with Texas Administrative Code § 215.208(d)(1)(A), promptly authorize the exchange of the Complainants' vehicle (the reacquired vehicle) with the Complainants' choice of any comparable motor vehicle.
2. The Respondent shall instruct the dealer to contract the sale of the selected comparable vehicle with the Complainants under the following terms:
  - a. The sales price of the comparable vehicle shall be the vehicle's Manufacturer's Suggested Retail Price (MSRP);
  - b. The trade-in value of the Complainants' vehicle shall be the MSRP at the time of the original transaction, less a reasonable allowance for the Complainants' use of the vehicle;

- c. The use allowance for replacement relief shall be calculated in accordance with the formula outlined in Texas Administrative Code § 215.208(b)(2) (the use allowance is \$9,761.85);
  - d. The use allowance paid by the Complainants to the Respondent shall be reduced by \$35.00 (the refund for the filing fee) (after deducting the filing fee, the use allowance is reduced to **\$9,726.85**, which is the amount that the Complainants must be responsible for at the time of the vehicle exchange).
3. The Respondent's communications with the Complainants finalizing replacement of the reacquired vehicle shall be reduced to writing, and a copy thereof shall be provided to the Department within twenty (20) days of completion of the replacement.
4. The Respondent shall obtain a Texas title for the reacquired vehicle prior to resale and issue a disclosure statement on a form provided or approved by the Department.<sup>37</sup>
5. The Respondent shall affix the disclosure label to the reacquired vehicle in a conspicuous location (e.g., hanging from the rear view mirror). Upon the Respondent's first retail sale of the reacquired vehicle, the disclosure statement shall be completed and returned to the Department.
6. Within sixty (60) days of transfer of the reacquired vehicle, the Respondent shall provide to the Department written notice of the name, address and telephone number of any transferee (wholesaler or equivalent), regardless of residence.
7. The Respondent shall repair the defect or condition that was the basis of the vehicle's reacquisition and issue a new 12 month/12,000 mile warranty on the reacquired vehicle.
8. Upon replacement of the Complainants' vehicle, the Complainants shall be responsible for payment or financing of the usage allowance of the reacquired vehicle, any outstanding liens on the reacquired vehicle, and applicable taxes and fees associated with the new sale, excluding documentary fees. Further, in accordance with 43 Tex. Administrative Code § 215.208(d)(2):
  - a. If the comparable vehicle has a higher MSRP than the reacquired vehicle, the Complainants shall be responsible at the time of sale to pay or finance the difference in the two vehicles' MSRPs to the manufacturer, converter or distributor; and

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<sup>37</sup> Correspondence and telephone inquiries regarding disclosure labels should be addressed to: Texas Department of Motor Vehicles, Enforcement Division-Lemon Law Section, 4000 Jackson Avenue Building 1, Austin, Texas 78731, Phone (512) 465-4076.

- b. If the comparable vehicle has a lower MSRP than the reacquired vehicle, the Complainants will be credited the difference in the MSRP between the two vehicles. The difference credited shall not exceed the amount of the calculated usage allowance for the reacquired vehicle.
9. The Complainants shall be responsible for obtaining financing, if necessary, to complete the transaction.
10. The replacement transaction described in this Order shall be completed within 20 days after the date this Order becomes final under Texas Government Code § 2001.144.<sup>38</sup> If the transaction cannot be accomplished within the ordered time period, the Respondent shall repurchase the Complainants' vehicle pursuant to the repurchase provisions set forth in 43 Tex. Administrative Code § 215.208(b)(1) and (2). The repurchase price shall be **\$158,252.08**. The refund shall be paid to the Complainants and the lien holder, if any, as their interests appear. If clear title is delivered, the full refund shall be paid to the Complainants. The calculations for the repurchase price are as follows:

Purchase price, including tax, title, license and registration	\$167,978.93
Delivery mileage	1,201
Mileage at first report of defective condition	1,445
Mileage on hearing date	99,750
Useful life determination	850,000

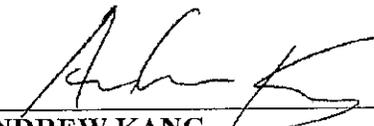
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<sup>38</sup> (1) If a party does not timely file a motion for rehearing, this Order becomes final when the period for filing a motion for rehearing expires, or (2) if a party timely files a motion for rehearing, this Order becomes final when: (A) the Department renders an order overruling the motion for rehearing, or (B) the Department has not acted on the motion within 45 days after the party receives a copy of this Decision and Order.

Purchase price, including tax, title, license and registration					\$167,978.93
Mileage at first report of defective condition	1,445				
Less mileage at delivery	-1,201				
<b>Unimpaired miles</b>	<b>244</b>				
Mileage on hearing date	99,750				
Less mileage at first report of defective condition	-1,445				
<b>Impaired miles</b>	<b>98,305</b>				
<i>Reasonable Allowance for Use Calculations:</i>					
Unimpaired miles	244	÷	850,000	×	\$167,978.93 = \$48.22
Impaired miles	98,305	÷	850,000	×	\$167,978.93 × 50% = \$9,713.63
<b>Total reasonable allowance for use deduction</b>					<b>\$9,761.85</b>
Purchase price, including tax, title, license and registration					\$167,978.93
Less reasonable allowance for use deduction					-\$9,761.85
Plus filing fee refund					\$35.00
<b>TOTAL REPURCHASE AMOUNT</b>					<b>\$158,252.08</b>

11. If the Complainants' vehicle is substantially damaged or there is an adverse change in its condition, beyond ordinary wear and tear, from the date of the hearing to the date of the Respondent's reacquisition of the vehicle, and the parties are unable to agree on an amount allowed for such damage or condition, either party may request reconsideration by the final order authority of the trade-in value of the Complainants' vehicle.

**SIGNED March 28, 2016**

  
 ANDREW KANG  
 HEARINGS EXAMINER  
 OFFICE OF ADMINISTRATIVE HEARINGS  
 TEXAS DEPARTMENT OF MOTOR VEHICLES